

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

December 10, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of KENNETH HANNAH, :  
PHILIP PAYNE, and FLOYD MEZO :  
 :  
v. : Docket No. LAKE 94-704-D  
 :  
CONSOLIDATION COAL COMPANY :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). Following an evidentiary hearing, Administrative Law Judge Gary Melick dismissed a discrimination complaint brought by the Secretary of Labor on behalf of Kenneth Hannah, Floyd Mezo, and Phillip Payne under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 17 FMSHRC 666 (April 1995) (ALJ). The judge concluded that disciplinary action taken by Consolidation Coal Company (“Consol”) against the three miners for engaging in a work refusal did not violate section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), because, at the time of their refusal, the miners no longer had a good faith, reasonable belief in a hazardous condition. 17 FMSHRC at 671-72. For the reasons that follow, we reverse the judge’s determination that the miners’ work refusal was unreasonable and unprotected, and his resultant finding that the disciplinary measures taken by Consol against the miners for engaging in a work refusal did not violate the Mine Act. We remand the case for computation of a backpay award and assessment of an appropriate civil penalty.

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this Panel of three Commissioners has been designated to exercise the powers of the Commission.

## I.

### Factual and Procedural Background

Kenneth Hannah, Floyd Mezo, and Phillip Payne were employed by Consol at its Rend Lake Mine in Sesser, Illinois. Tr. 198-99, 258-59, 310-11. Rend Lake Mine is considered a “gassy” mine because of the amount of methane it liberates. Tr. 160, 219. During the last shift on April 9, 1994, the mine experienced a power outage, causing the ventilating fans to shut down. 17 FMSHRC at 668. In the early morning hours of Sunday, April 10, Hannah, Mezo, Payne and other miners were called to the mine to help restore power underground. *Id.* at 667-68, 670.

On the morning of April 10, Mezo and Payne were in the wash house, waiting to go underground, when three of the miners assigned to perform the preshift examination returned to the surface. *Id.* at 670. Mezo and Payne overheard the examiners discussing among themselves whether the secondary escapeways should have been inspected as part of that examination. *Id.* At least two of the examiners expressed the view that the secondary escapeways should have been included in the preshift examination, and that the escapeways had always been examined in the past following a fan stoppage. Tr. 46-47, 49, 108-09, 262.<sup>2</sup> The examiners indicated that, without such an examination, it was not possible to determine whether methane may have accumulated in the escapeways. Tr. 262-63.

The escapeways are part of the mine ventilation system and are used to carry methane gas out of the mine. Tr. 42-43, 483. Methane can accumulate in the escapeways following a fan stoppage. Tr. 483-84, 522. The escapeways also contain electrical equipment, including pumps, that could trigger an ignition in the event of a malfunction in the presence of explosive levels of methane. Tr. 106-07, 170-71, 275.

Mezo and Payne went to the office of their immediate supervisor, John Moore, to report their concerns about the propriety of the preshift examination and the safety of restoring power in the mine. 17 FMSHRC at 670; Tr. 202-03, 263-64, 454. Payne expressed his concern about a possible methane buildup in the mine. Tr. 491. Moore indicated that he was not a mine examiner and did not know whether the preshift examination was adequate, but he agreed to find out. 17 FMSHRC at 670. Moore then attempted to call someone, and Mezo and Payne returned to the wash house. *Id.* In the wash house, Mezo and Payne discussed with Hannah, a member of the mine safety committee, their concerns about the preshift examination and their meeting with Moore, and asked Hannah to represent them in their discussions with management concerning this safety issue. *Id.* at 668, 670.

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<sup>2</sup> Several mine examiners, including one of these three examiners, had previously been informed after a mine stoppage incident several weeks earlier, that state inspector William Sanders had determined that an inspection of the secondary escapeways was not required following a fan stoppage. 17 FMSHRC at 668 n. 3. There is no evidence, however, that Hannah, Mezo or Payne were aware of this ruling at the time of their work refusal. *Id.*

Before meeting with Moore, Hannah discussed the situation with the three examiners who had returned to the surface. The examiners told Hannah that the entire mine, including the secondary escapeways, should be checked before power is restored. *Id.* at 668. Hannah, Mezo, and Payne then met again with Moore in his office. Hannah explained what he had been told by the examiners and asked Moore if he knew whether the preshift examination had been properly conducted. *Id.* Moore responded that he did not know because he was not experienced in production. *Id.* Hannah replied that he did not know either because he was a surface electrician, with no underground mining experience. *Id.* at 667-68. Moore then called assistant mine superintendent Rick Harris. *Id.* at 668.

While he was on the phone with Harris, Moore called the three mine examiners to his office. *Id.* Two of the examiners expressed the view that the mine had not been properly examined following the fan stoppage because the secondary escapeways had not been inspected. *Id.*; Tr. 266-67, 322. After completing his phone conversation with Harris, Moore told the miners that Harris said the mine examination had been proper. 17 FMSHRC at 668. Moore also told the miners he had discussed the situation with mine superintendent Joseph Wetzel, who also confirmed that the examination had been properly conducted. Tr. 456-57, 477. Hannah told Moore that the mine examiners disagreed and that they needed to get the “proper people” to the mine to make sure it was safe. 17 FMSHRC at 668. Hannah then read to Moore provisions of the applicable collective-bargaining agreement, which provided that in the event of a disagreement between miners and management on a safety issue arising under state or federal law, the appropriate officials were to be contacted. *Id.* at 668-69.

Shortly thereafter, Moore appeared at the wash house and told Hannah, Mezo, and Payne that Consol safety director Kit Phares had contacted state inspector William Sanders, who indicated the preshift examination had been properly conducted and that it was not necessary to inspect escapeways during the examination. *Id.* at 669, 671; Tr. 324-25, 414, 457-58, 548-49. Moore consequently issued a direct order to Mezo and Payne to return to work. Tr. 33, 118-19, 415, 457. Hannah again referred to the contract provision requiring the presence of an appropriate state or federal official to resolve a safety dispute, and asked Moore to either call state inspector Sanders himself, or allow Hannah to call Sanders. 17 FMSHRC at 669, 671; Tr. 325, 458, 464-65, 549. Moore refused, explaining that mine superintendent Wetzel had been called to the mine and would handle the matter thereafter. 17 FMSHRC at 669, 671; Tr. 325-26, 458, 465. Mezo and Payne stated that they were invoking their “safety rights” in response to the work order issued by Moore. 17 FMSHRC at 669; Tr. 86, 270, 326.

Hannah returned to his work area where his foreman, Gary Phelps, directed him to restore power to the mine. Hannah refused, noting that two mine examiners were still underground at the time. 17 FMSHRC at 669. Hannah stated that he was invoking his “individual safety rights” because if there was an electrical fault with methane present, it could trigger an explosion that would kill or maim the examiners still underground. *Id.*; Tr. 330-31, 347, 359. Moore then also gave Hannah a direct order to turn the power on. Hannah again refused with the same explanation. 17 FMSHRC at 669. Hannah then told Moore that he had other work duties to

perform, and Moore told him to return to his other work. *Id.*

A short time later, Hannah was called to a meeting in the office of mine superintendent Wetzel, where Wetzel was questioning Mezo and Payne about the basis for their work refusal. *Id.* Hannah intervened, and explained that the miners were concerned about causing an explosion and killing themselves and fellow workers. *Id.* Hannah also read to Wetzel the applicable contract provision which required calling in an appropriate state or federal official in the event of a safety dispute. Tr. 334-35. Wetzel responded that the state inspector had been called and would be there shortly. Tr. 278, 335. Wetzel and Gerald Kowzan, Consol's supervisor of human resources, warned the miners they could be subject to disciplinary action, including discharge and the removal of Hannah from the safety committee, for improperly invoking their "safety rights" under the Contract. Tr. 278, 335-36, 646-47.

When inspector Sanders arrived at the mine, he met with Wetzel and the three miners. 17 FMSHRC at 669; Tr. 147-48, 279-80, 596-97. Hannah asked Sanders whether an inspection of the mine in its entirety was required following a power outage and fan stoppage. 17 FMSHRC at 669. Sanders responded that under state law secondary escapeways only had to be examined every twenty-four hours, and did not need to be reexamined after a power outage. *Id.* Sanders also indicated that it was safe to turn on the power in the mine. *Id.* Hannah then told Mezo and Payne it was time to turn on the power and return to work. *Id.* at 669-70. Wetzel, however, informed the miners that the matter was not over and that they were subject to discipline and the removal of Hannah from the safety committee. *Id.* at 670.

Consol suspended Hannah, Mezo, and Payne, with the intent to discharge them, because they had failed to obey direct work orders. 17 FMSHRC at 666 n.1; Tr. 599. Hannah subsequently filed a grievance in connection with this disciplinary action, which resulted in a two-day hearing before an arbitrator. Tr. 432, 656. On April 25, the arbitrator issued a decision in which he found that Consol had just cause for disciplining the three miners, but also concluded that the penalty of discharge was too severe because of mitigating factors, and therefore ordered the three miners reinstated without back pay. 17 FMSHRC at 666 n.1; Tr. 599, C. Ex. 1. The record indicates that Hannah, Mezo, and Payne had never previously refused a work order or raised a safety concern, and had not been subject to any prior disciplinary action. Tr. 255-56, 280, 341-42, 492, 521-22, 673.

Hannah, Mezo, and Payne filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and the Secretary filed the present complaint on their behalf, pursuant to Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).<sup>3</sup>

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<sup>3</sup> Section 105(c)(2) provides in part:

Any miner . . . who believes that he had been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation

The judge concluded the disciplinary action taken by Consol against the three miners did not violate the Mine Act because, at the time of their work refusal, the miners no longer had a good faith, reasonable belief in a hazardous condition that justified their refusal to work. 17 FMSHRC at 671-72. This conclusion was based on the judge's finding that, in response to the miners' stated safety concerns, Consol management had fulfilled its obligation to address the perceived danger communicated by the three miners by contacting a state inspector to confirm that the preshift examination was proper and that no safety hazard existed, and then conveying that information to the miners. *Id.*

The judge further concluded that if the miners did not believe the statements of Consol mine officials concerning their communications with inspector Sanders, it was the miners' obligation to contact Sanders themselves to confirm that the preshift examination had been properly conducted. *Id.* The judge discredited the testimony of the miners that they were prohibited from using telephones at the mine without permission, and instead credited testimony of Consol officials that there was no company policy prohibiting the use of telephones by employees and that the miners could have called the state inspector themselves. *Id.* at 672. The judge concluded that the miners' failure to either accept the reported statements of Sanders or to verify those statements by calling Sanders themselves rendered their continued refusal to work unreasonable, and therefore unprotected. *Id.* He also concluded that their suspension by Consol for their continued work refusal did not violate the Mine Act. *Id.* Accordingly, the judge dismissed the discrimination proceeding. *Id.*

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's finding that the miners' work refusal was unreasonable and unprotected under the Mine Act.

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occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2).

## II.

### Disposition

#### A. General Principles

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). An operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Mine Act grants miners the right to complain of a safety or health danger, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. The purpose of this requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.*

The Commission has held that, for a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). If the miner expresses a reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529,

1534 (September 1983). Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). Accordingly, a miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99.

B. The Adequacy of Consol's Response to the Miners' Safety Concerns

The Secretary contends the judge erred in finding that Consol had taken adequate steps to allay the miners' safety concerns because the operator's response was based upon third-party statements made by the state inspector to a Consol official who was not present at the mine and therefore was not available to explain the situation to the miners directly. S. Br. at 10-16. The Secretary asserts that, in view of the concerns expressed by the miners about a possible methane explosion and the other troubling circumstances, Consol had an obligation to permit the miners to speak directly to the state inspector to confirm that he considered the preshift examination to have been properly conducted. *Id.* at 15-16. In response, Consol does not challenge the good faith of the miners in initially raising concerns about the adequacy of the preshift examination, but contends that the judge correctly determined its response to the miners' expressed safety concerns was sufficient to allay their concerns and to render their subsequent work refusal unreasonable and unprotected. C. Br. at 4-9. Consol argues the Secretary has failed to provide any evidence to show that the miners had a justifiable basis for refusing to believe the assurances of supervisory and managerial personnel regarding the propriety of the preshift examination, or that would warrant imposing an obligation on the company to arrange for the miners to speak directly to the state inspector. *Id.* at 5, 8-9.

The dispositive issue in this case is whether Consol addressed the concerns expressed by the three miners in a manner sufficient to quell their fears, thereby rendering their subsequent work refusal unreasonable and unprotected.<sup>4</sup> We conclude that substantial evidence does not support the judge's finding that the actions taken by Consol officials in response to the miners' safety concerns fulfilled its obligation to address their fears resulting from the perceived inadequacy of

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<sup>4</sup> The overwhelming record evidence demonstrates, and Consol does not dispute, that the three miners initially had a reasonable, good faith concern regarding the propriety of the preshift examination and the safety of restoring power to the mine, which they expressed to supervisor Moore. The fact that supervisor Moore initially indicated that he did not know whether the preshift examination was proper or if inspection of the escapeways was required further indicates the reasonableness of the miners' safety concerns.

the preshift examination.<sup>5</sup>

First, the judge failed to adequately consider evidence indicating that the safety concerns raised by the miners were serious in nature, involving the risk of an explosion due to potential accumulations of methane gas in escapeways that would have been detected by an inspection of those areas. The record indicates the three miners were concerned that if power was restored to the mine when there was methane gas present in the escapeways, a spark or electrical problem could cause an explosion that could kill or injure them or their co-workers,<sup>6</sup> and that they repeatedly conveyed these concerns to Consol management.<sup>7</sup> Tr. 215-16, 219-21, 272-73, 275-77, 330-31, 332-33, 394, 557-58, 613, 649. The seriousness of their concerns was corroborated to a significant extent by inspector Sanders, who testified that the type of fan stoppage which occurred at the Rend Lake Mine on April 9 would give rise to a legitimate concern about methane gas accumulations in secondary escapeways, and that a potential hazard exists in re-energizing electrical equipment in an area of methane accumulation that has not been examined. Tr. 155-56, 170-71. The seriousness of the miners' concerns was further underscored by Rend Lake Mine's status as a gassy mine. Tr. 160, 219, 481, 536.

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<sup>5</sup> The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

<sup>6</sup> While Hannah did not work underground, and thus would not himself have been exposed directly to the risk of death or injury from an explosion that could have resulted from restoring power when accumulations of methane gas were present, this does not in itself render his work refusal unprotected. The Commission has held that, in appropriate circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task due to the danger posed to the health or safety of another miner. *Secretary of Labor on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364 (4th Cir. 1986).

<sup>7</sup> The three complainants had never previously raised safety concerns or refused a work order, and had not been subject to any prior disciplinary action. Tr. 255-56, 280, 341-42, 492, 521-22, 559, 673. This evidence indicates that these three miners were not likely to raise their safety concerns lightly, or in bad faith. See *Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1072 (July 1986) (work refusal found protected where there was no evidence in miners' personnel history "suggesting a likelihood of pretext or ulterior motive for their actions"), *aff'd mem.*, 829 F.2d 31 (3d Cir. 1987).

Further, the information provided to the miners by supervisor Moore concerning the propriety of the preshift examination consisted of second and third-hand statements from various Consol officials. The supervisors were not present at the mine to discuss the situation with the miners directly or explain to them why the procedures followed were safe and that there was no danger in restoring power to the mine. The Commission has previously determined that an operator did not respond sufficiently to allay reasonable fears when its assurances of safety were lacking in detail and unaccompanied by any satisfactory explanation. *Hogan*, 8 FMSHRC at 1074.

In addition, the judge did not address uncontradicted testimony from the miners that inspector Sanders acknowledged that his opinion – that examination of the escapeways was not required during a preshift examination following a power outage – represented a change in interpretation of applicable Illinois law. Tr. 280, 378-79, 383. This evidence suggests that the miners had a reasonable basis for questioning statements attributed to state inspector Sanders by Moore and various Consol officials (that the preshift examination had been conducted in accordance with state law since examination of escapeways was not required), and requesting to discuss these matters directly with Sanders. We have held that the reasonableness of a miner's safety concern is to be evaluated from the viewpoint of the miner at the time of the work refusal, and that objective proof that an actual hazard existed is not required. *Hogan*, 8 FMSHRC at 1074; *Pratt*, 5 FMSHRC at 1533-34; *Robinette*, 3 FMSHRC at 811-12.<sup>8</sup>

Moreover, the record indicates that Consol could have easily defused the situation, and resolved this safety dispute, by acceding to the miners' requests to call Sanders to confirm the statements attributed to him regarding the propriety of the preshift examination. Moore did not deny that he refused the miners' request to call Sanders, but only disputed their testimony regarding when such a request was first made. 17 FMSHRC at 670-71. Moore testified that he denied their request because Wetzel, a higher level management official, was already on his way to the mine. *Id.* at 671. Moore admitted that he did not explore the possibility that calling the inspector could have resolved the safety issue. Tr. 480-81. Consol's inability to provide any satisfactory explanation for Moore's refusal to call state inspector Sanders, or to allow the miners to speak to Sanders directly, when such a telephone call would have likely resolved the situation, is a further indication that Consol's response was not sufficient to address the miners' safety concerns, and therefore did not render their work refusal unreasonable or unprotected.

Based on these considerations, we conclude that substantial evidence in the record viewed as a whole does not support the judge's finding that Consol fulfilled its obligation to address the perceived danger communicated by the miners in a manner sufficient to quell their fears, and render

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<sup>8</sup> That a perceived hazard is later found not to constitute an actual violation of a health or safety standard does not vitiate the reasonableness of a miner's work refusal. *Hogan*, 8 FMSHRC at 1072 n.3, 1073 n.4.

their subsequent work refusal unreasonable and unprotected.<sup>9</sup> We therefore reverse the judge's conclusion that the disciplinary measures taken by Consol against the miners for engaging in a work refusal did not violate the Mine Act. We remand the case for computation of a backpay award and assessment of an appropriate civil penalty.

C. The Miners' Obligation to Contact the State Inspector

The Secretary also challenges the judge's determination that if the miners did not believe the statements of mine officials concerning their discussions with the state inspector, it was the miners' obligation to contact the state inspector themselves to determine whether the preshift examination had been properly conducted. *See* 17 FMSHRC at 671-72. The Secretary argues that the burden of contacting the state inspector to determine the propriety of the preshift examination properly resided with Consol, rather than the three miners. *S. Br.* at 15. Consol contends that the Secretary has failed to establish any basis for imposing an obligation on the company to arrange for the miners to speak directly to the state inspector. *C. Br.* at 5.

Given our conclusion that substantial evidence does not support the judge's determination that Moore's statement was sufficient to quell the miners' fears, we agree with the Secretary that the judge erred by placing the burden on the miners to contact the state inspector to resolve their safety concerns. Established Commission precedent places the duty of addressing such concerns on the operator. *See Gilbert*, 866 F.2d at 1441; *Pratt*, 5 FMSHRC at 1534.<sup>10</sup>

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<sup>9</sup> To support his conclusion that Consol had "fulfilled its obligation to address the perceived danger . . . communicated by the [miners]" by contacting state inspector Sanders, the judge cited *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993). 17 FMSHRC at 672 n.4. In *Braithwaite*, however, we concluded that the miner had failed to adequately communicate his safety concern to the operator, and therefore we had no need to address the adequacy of the operator's response. 15 FMSHRC at 2464-65.

<sup>10</sup> Because we conclude that Consol did not adequately address the safety concerns raised by the three miners, and that the judge therefore erred in shifting to the miners the burden of establishing the adequacy of Consol's actions to quell the miners' fears, we find it unnecessary to address the Secretary's challenge to the judge's decision to credit the testimony of Consol officials that there was no company policy prohibiting the use of telephones by employees and that the miners could have used the phone to call Sanders directly to confirm that inspection of the escapeways was not required as part of the preshift examination. *S. Br.* at 16-21. As Consol in effect concedes (*C. Br.* at 10), the issue of whether the miners could have called the state inspector on their own has no bearing on the dispositive issue in this case – the adequacy of Consol's response to the miners' safety concerns at the time of their work refusal.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that the work refusal engaged in by the three miners was unreasonable, and therefore unprotected under the Mine Act, and consequently conclude that Consol's discipline of the miners for their refusal to work violated Section 105(c)(1) of the Mine Act. We remand this matter to the judge for computation of a backpay award and assessment of an appropriate civil penalty.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner